FOR ARGUMENT

Supreme Court, U.S.
FILED
JUL 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-952

RANDAL RUSH, et al.,

Appellants,

vs.

JEFFREY D. SAVCHUK,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLANTS' REPLY BRIEF

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1979—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

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ARGUMENT

I.

Lack of Significance of Plaintiff's Residence

In the final analysis, *Shaffer v. Heitner,* 433 U. S. 189 (1977), does mean and will mean exactly what this Court says it means. However, it is instructive to compare this Court's clear language with the meaning derived therefrom by the appellee in the instant case. In *Shaffer,* this Court held:

> "The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent

with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe.*" (433 U. S. at 207).

And what is the minimum contacts standard elucidated in *International Shoe?* It is the "relationship among the defendant, the forum and the litigation" (433 U. S. at 204).

The first step in appellee's reasoning is to paraphrase this standard as follows: The "relationship between [sic] the forum, the par*ties*, the *property* and the litigation".[1] This paraphrase substitutes "parties" for the defendant and adds "property" to the standard.

If the instant case were an in rem action in which title to the seized property was at issue, or if the instant case involved an accident which occurred on the seized property, then the addition of "property" to the standard would be legitimate (See *Shaffer*, 433 U. S. at 207-208). But where the seized property, as in the instant case, is completely unrelated to plaintiff's cause of action and the only role played by the seized property is to bring the defendant into court, appellee's addition of "property" to the standard is entirely inappropriate (See *Shaffer*, 433 U. S. at 209).

Much more troublesome is the substitution of "parties" for "defendant" in the standard. One need only read a few pages further into Appellee's Brief[2] before it becomes obvious that when appellee uses the term "parties", he means "plaintiff". According to appellee, it is plaintiff's residence in Minnesota which, however transitory, provides the principal—indeed the controlling—constitutional nexus.[3]

[1]Appellee's Brief, p. 7 (emphasis supplied).
[2]Appellee's Brief, pp. 10-11, 14.
[3]It appears that appellee has once again emigrated—this time to Pennsylvania. While not directly material to the issues of this case, appellee's history of being a resident of three states in six years is significant. Our migratory tendencies demonstrate how ephemeral is the residency of a plaintiff in any balancing of interests of the parties for due process purposes, and illustrate how fragile are the pious pronouncements of the Minnesota Courts concerning the necessity of providing a local forum for its Minnesota residents. (See *Savchuk I*, A. 37; 245 N. W. 2d 624; *Savchuk II*, A. 58-59; 272 N. W. 2d 888).

Of course, it would be quite simple if the controlling minimum contact were plaintiff's residence in the forum state. One would only need to ascertain plaintiff's residence to establish jurisdiction. But plaintiff's residence is utterly immaterial to the establishment of due process as to the foreign defendant. It is he, not the plaintiff, who is being dragged to a distant forum and exposed to substantive law rules which are far different from those in effect in his home state—the locus of the alleged delicti—the *only* state with a relationship to the litigation. No due process question exists as to plaintiff; the sole issue is whether or not due process is being afforded to the defendant by the quasi in rem procedure utilized by plaintiff.

II.

Lack of Significance of the Insurer's "Presence"

Appellee attempts to bolster his argument that the plaintiff's residence should be the controlling factor by pointing out that the defendant's insurer, because it does business in the forum state, is fortuitously "present" there and thus is fortuitously subject to in personam (garnishment) jurisdiction there. Stripped of its sophistries, plaintiff's argument must be recast as follows: If defendant's insurer is fictionally present in the forum state, then defendant is afforded due process; if it is not, then defendant is not afforded due process. When viewed in this manner, it is readily apparent that the presence of the insurer within the forum is not constitutionally significant. The insurer's presence in Minnesota is

wholly unrelated to the Indiana defendant and to the Indiana contract of insurance and to the Indiana accident. Defendant cannot control where his insurer may or may not do business. The fact that the insurer may write policies in Minnesota insuring Minnesotans has nothing to do with the defendant's or his insurer's activities in Indiana.

Appellee's argument may easily be tested by changing one fact in *Shaffer*. Suppose that plaintiff Heitner had not attached corporate stock and had, instead, attached an officer's and director's professional liability policy issued to the defendants in Oregon by a foreign insurance company which was "present" in Delaware because it did some business there. Would not this Court have decided the case in the same manner and for the same reasons? What difference does the kind of res make so long as the res is not the subject matter of the litigation?

Furthermore, as this Court held in *Perkins v. Benguet Consolidated Mining Co.*, 342 U. S. 437, 446-47 (1952), the *International Shoe* test of fairness governs an attempted assertion of in personam jurisdiction over a foreign corporation in respect to a claim against that corporation arising out of business conducted outside the forum state. It follows that even greater scrutiny should be given to an attempted seizure of an obligation which is owed by a foreign corporation to a nonresident of the forum state and which is wholly unrelated to the business conducted by the foreign corporation in the forum state. In the usual *Perkins* case, the plaintiff has a direct claim against the foreign corporation—not against somebody else. But where the fictional "presence" of the foreign corporation in the forum (a) is used by a plaintiff (b) to seize a contingent obligation owed by the foreign corporation to a defendant who is a

nonresident of the forum state (c) which obligation arises out of business not conducted in the forum state (d) for the sole purpose of obtaining quasi in rem jurisdiction over that nonresident defendant, it would seem that the *International Shoe* element of fairness in respect to the exercise of such in personam jurisdiction over the foreign corporation is entirely lacking. In this regard, this Court's cautionary language in *International Shoe Co. v. Washington*, 326 U. S. 310, 319 (1945), is pertinent:

> "But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."

Certainly it cannot be said that the insurer in the instant case derived any protection or benefits of Minnesota law when it made a contract in Indiana with an Indianan, thus justifying a *Harris v. Balk* attachment in Minnesota of its obligation to that Indianan. As suggested by the dissent in *Simpson v. Loehmann*, 21 N. Y. 2d 990, 324 N. E. 2d 669, 678 (1968), this kind of attachment can be justified only where requisite *International Shoe* minimum contacts with the seized property exist.[4] However, regardless of the

[4] In this context, it should be noted that under Minnesota law, a liability insurer is not deemed a real party in interest in a tort case and is not subject to direct suit regardless where the tort claim arose. E. g., *Myers v. Government Employees Insurance Co.*, 302 Minn. 359, 225 N. W. 2d 238, 243 (1974); *Miller v. Market Men's Mutual Ins. Co.*, 262 Minn. 509, 115 N. W. 2d 266, 268 (1962); *Savchuk v. Rush* (I), 245 N. W. 2d 624, 629 (Minn. 1976) (A. 38); see also *Gjorik v. Bemidji Local Bus Line*, 223 Minn. 552, 27 N. W. 2d 273 (1947).

constitutional validity of the ganishment, this Court need not consider that matter (unless it so wishes) because of the lack of the requisite minimum contacts with the defendant himself.

III.

Lack of Significance of the Limitation on Defendant's Liability

Appellee also seeks to distinguish *Shaffer v. Heitner, supra,* on the basis that, in *Shaffer,* an appearance by the defendants would have subjected them to an exposure in excess of the value of the seized property while, in the instant case, defendant's exposure is limited to the value of the seized property.[5] This argument overlooks this Court's clear pronouncement that the fairness of subjecting a defendant to state court quasi in rem jurisdiction does not depend on whether or not his liability is limited to the seized res (See *Shaffer,* 344 U. S. at 207, n. 23).

IV.

Significance of Defendant's Lack of Contacts

In summary, appellee's argument concerning the relationship among the forum, the parties, the property, and the litigation is merely a poorly disguised attempt to disregard the *Shaffer* standard of the relationship among the defendant, the forum, and the litigation, and to substitute therefor an entirely novel standard—the relationship among the plaintiff, the forum, and the insurer. But, no matter how appellee's argument may be viewed, it cannot survive the corollary standard so clearly stated in *Shaffer:*

[5]Appellee's Brief, pp. 12-13.

> "* * * if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible * * *." (433 U. S. at 209).

Since defendant has absolutely no contacts with the State of Minnesota, it follows that, as the Chief Justice of Minnesota candidly noted in *Savchuk I,* there is no basis for an assertion of personal jurisdiction over him.[6] Therefore, there is no basis for an assertion of quasi in rem jurisdiction over him.

CONCLUSION

Appellants respectfully request that the judgment of the Minnesota Supreme Court be vacated and that the action against them be dismissed for lack of jurisdiction.

Respectfully submitted,

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[6]A. 16; 245 N. W. 2d 629.